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# In the United States Circuit Court of Appeals

## For the Ninth Circuit

PACIFIC COAST COMPANY, a Corporation,
*Appellant,*

vs.

GEORGE E. JAMES and EDWARD WEBSTER,
*Appellees.*

APPEAL FROM DISTRICT COURT FOR DISTRICT OF ALASKA, DIVISION NUMBER ONE.

**Brief of Appellant**

SHACKLEFORD & BAYLESS,
Attorneys for Appellant.

FARRELL, KANE & STRATTON,
Of Counsel, Seattle, Wash.

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### STATEMENT OF THE CASE

This is a suit in equity by plaintiff below, appellant here, seeking to enjoin the driving of piles and the construction of a wharf upon certain tide lands, claimed by plaintiff, in front of Blocks O, P, Q, R, S and T, in the Townsite of Juneau, Alaska. There was a cross bill filed by the defendant praying for similar injunctive relief. At the hearing upon the respective orders to show cause, both parties were restrained pendente lite from driving piles. Upon the trial on the merits, the defendant was awarded the property

in controversy, described as the 113 feet of tide lands in front of said Blocks S and T; and plaintiff was perpetually enjoined from asserting any title to the property and from interfering with or obstructing defendant's possession. From that judgment plaintiff has appealed.

The 19 assignments of error (Rec. pp. 818 et seq.) bring to the attention of the Court every phase of the single question to be decided here, which is whether or not appellant has title to, and right to the possession of, the tide lands in dispute.

We claim that the undisputed testimony in this case shows the following state of facts: On March 6, 1881, M. W. Murry located, claimed and went into the possession of a tract of land 600 feet square about one-eighth of a mile to the eastward of the settlement known as Rockwell (now Juneau), Alaska. *This location was partly upon upland and partly upon tide lands.* The description in Murry's location notice (Rec. p. 610) shows that two of the corner stakes were placed at low water mark and that the westerly line of the wharfsite ran along low water mark, between these two points. The location notice was afterwards recorded with the local recorder, under the miners' rules and regulations, on the 12th of March, 1881 (Rec. p. 610).

Gold was discovered in Gold Creek near the present Town of Juneau in the fall of the year 1880, causing the first mining excitement in Alaska. In the spring of 1881 a rush of miners occurred, and a set-

tlement was made along the beach of Gastineau Channel, near the mouth of Gold Creek. This settlement was first known as Rockwell and afterwards as Juneau.

In 1881 there was no civil government act applicable to Alaska; no governmental organization had been created by Congress for this portion of the public domain, and whatever property rights were recognized and protected were so recognized and protected by common consent of the miners and citizens. A meeting of the miners and citizens of Rockwell (now Juneau) was held on the 21st of March, 1881 (Rec, p. 611) and a committee appointed to lay out a water front line, cross streets, determine the size of lots, etc., and report at a meeting to be held on March 26, 1881. On that date the question of the location of Captain Murry was presented at the adjourned meeting and the miners and citizens, realizing that the building of a wharf by Captain Murry would be of public benefit, thereupon unanimously passed a resolution endorsing and recognizing Captain Murry's rights, and resolving that by their future acts they would recognize his rights to the wharfsite and improvements (Rec. pp. 612, 613).

The wharf was built by Captain Murry at the center of his wharfsite and became knows as the Carroll-Murry wharf. Construction work was commenced in August or September, 1881, and was completed in the spring of 1882. The wharf consisted of a wharf proper, constructed of cribbing or logs, and upon this substantial warehouse and coal house buildings were

erected. From the cribbing an approach extended over the tide lands, about 140 feet to the face of the dock, which was built in the shape of the letter "T," and was about 40x60 feet in dimensions. Two piles were driven in the tide lands between high and low tide, on the north and south limits of the tract, and were used both to define the boundaries of the wharfsite and also in mooring vessels at the face of the wharf. From 1882 to 1894 the Carroll-Murry wharf was the only one in Juneau, and all vessels which landed there ran lines ashore in stress of weather and at other times, to these two piles in order to hold the ships fast to the dock. This practice of running lines ashore to the two piles on the tide lands was necessary for the safety of the ship on account of the smallness of the face of the wharf, and was followed as long as the Carroll-Murry wharf was maintained as a public dock, which was during the period from 1882 to 1894. The wharfsite and the buildings and improvements situated thereon, from 1882 to 1894, were continuously used and occupied by appellant and its grantors. Beginning with the year 1894 the use of the wharf by ocean-going vessels was gradually discontinued and such ships landed at another wharf of the appellant, which had then been constructed nearer to the business center of Juneau, although the Carroll-Murry wharf was used until 1896 as a public dock. After that time this wharf was not frequented by deep sea vessels. Thereafter the wharf and the blocks of land immediately adjoining the wharf as well as the wharf buildings and im-

provements, were leased by the appellant and used by its tenants variously as a sardine cannery, smokehouse, glove factory and storage warehouse; and the wharf proper was used as a landing place by the smaller fishing craft. A portion of the wharf building was also used as a foundry by the Forrest Iron Works under lease from appellant. From 1894 the old wharf, together with the buildings and improvements situated upon the wharfsite, were continuously occupied for the purposes aforesaid by tenants of appellant and its granors, taxes were paid by appellant, and a bona fide claim of title to the whole 600 feet of tide lands described in the Murry location notice was made.

See testimony Webster (Rec. pp. 66-86, 366-377).

See testimony Wells (Rec. pp. 87-116).

See testimony Winter (Rec. pp. 382-390).

See testimony Swan (Rec. pp. 263-298).

See testimony Ewing (Rec. pp. 119-130, 361-365).

See testimony Dautrick (Rec. pp. 334-359).

See deposition Captain Lloyd (Rec. pp. 795-803, 785-793).

See deposition Captain Hunter (Rec. pp. 722-742).

See Plaintiff's Exhibit No. 23 (Rec. p. 691), a photograph showing the S. S. Queen, a vessel 331 feet long (Rec. p. 331), at the Carroll-Murry wharf, with head and stern lines running ashore (Plaintiff's Exhibits Nos. 20 and 19).

The Carroll-Murry wharfsite and the whole thereof was conveyed by mesne conveyances executed between 1884 and 1898 to appellant's grantors. Appellant acquired title to the wharfsite, uplands and tide lands, including the portion in dispute herein, together with the improvements thereon, by deeds executed in 1898 (Rec. pp. 614-690), and has never had the intention of abandoning any portion of the same. But, on the contrary, appellant intended to construct a larger wharf having a face of 600 feet upon that site (Rec. pp. 120, 121, 122, 697). The wharfsite was subdivided into lots and blocks, of which Blocks R, S and T are portions (Rec. p. 670).

This was the situation in 1900. On or about April 15th of that year the appellee commenced landing rafts and scows upon a portion of the tide lands of the wharfsite, and casually and intermittently continued to land such scows and rafts thereon until 1905. Appellee never at any time defined the boundaries of the land now claimed by him, by stakes, fences or monuments on the ground. He constructed no permanent improvements upon said premises prior to the year 1905. In that year he constructed a small platform and in 1906 a gridiron. In 1907 he erected a westerly approach from lower Franklin Street to the gridiron, and in 1912 constructed an easterly approach from lower Franklin Street. These structures cover 113 feet of tide lands in front of Blocks S and T, and occupy all the ground claimed by appellee. At the time of the institution of this action he had no other improve-

ments on said ground. Appellee lays no claim to the land by virtue of any deed, location notice or other paper writing which would be color of title, but claims the same by virtue of his use, possession and occupation. Appellee's possession was not openly, notoriously and continuously *adverse* to appellant for the period of ten years or for any other period.

See testimony James (Rec. pp. 407-516).

See testimony Webster (Rec. pp. 241-262, 366-381).

Appellee claims to have occupied the premises in dispute from April 15, 1900, to the date this suit was commenced. During this period appellant exercised the following acts of ownership over the same. In 1901, 1902 and 1903 G. H. Messerschmidt occupied the disputed premises under permission from the company, and in 1905 Charles E. Davidson, as receiver of the Willson-Sylvester Estate, erected a platform thereon and occupied the same during the summer of 1905 under a written lease from the appellant. The remainder of the wharfsite tide lands and the buildings thereon were occupied by tenants of appellant and appellant has at all times paid the taxes on the property. Its agents have been instructed to keep the same free of squatters and protected in every way possible. Shortly after this action was instituted a resurvey of the property was made and different numbers given to the lots and blocks (Rec. pp. 678, 804).

See testimony Messerschmidt (Rec. pp. 525-557, 567-576).

See testimony Davidson (Rec. pp. 576-585).

See testimony Dautrick (Rec. pp. 334-360, 557-567).

See testimony Swan (Rec. pp. 263-298).

See testimony Ewing (Rec. pp. 361-365).

See Plaintiff's Exhibit No. 22 (Rec. p. 687).

## ARGUMENT.

From the undisputed facts we claim as matters of law that:

1. APPELLANT, HAVING USED, OCCUPIED AND CLAIMED, UNDER COLOR AND CLAIM OF TITLE, THE WHOLE CARROLL-MURRY WHARFSITE, INCLUDING THE TIDE LANDS IN CONTROVERSY, FROM 1881 UNTIL 1894, AND HAVING USED, OCCUPIED AND CLAIMED AS AFORESAID THE GREATER PORTION OF SAID WHARFSITE FROM 1894 UNTIL THE DATE OF THE COMMENCEMENT OF THIS ACTION, AND NEVER HAVING ABANDONED THE PROPERTY IN DISPUTE, AND THE APPELLEE HAVING ACQUIRED NO TITLE BY ADVERSE POSSESSION, APPELLANT IS NTITLED TO THE POSSESSION OF THE DISPUTED PREMISES AND TO THE INJUNCTIVE RELIEF PRAYED FOR.

This proposition, for convenience, we will subdivide as follows:

(A).—APPELLANT, HAVING USED, OCCUPIED AND CLAIMED THE WHOLE OF THE

CARROLL-MURRY WHARFSITE, INCLUDING THE PREMISES IN DISPUTE, ON AND PRIOR TO MAY 17, 1884, AND NOT HAVING ABANDONED THE SAME, IS PROTECTED IN ITS POSSESSION BY THE ACT OF CONGRESS PASSED ON THAT DATE.

(B).—APPELLANT, HAVING BEEN IN ACTUAL POSSESSION OF THE GREATER PORTION OF THE CARROLL-MURRY WHARFSITE AND CLAIMING THE WHOLE THEREOF UNDER COLOR AND CLAIM OF TITLE, MUST BE CONSIDERED TO HAVE BEEN, AT THE DATE APPELLEE ENTERED UPON THE PREMISES IN DISPUTE, IN ACTUAL POSSESSION OF THE SAME.

(C).—THE POSSESSION OF APPELLEE, NOT HAVING BEEN CONTINUOUS AND ADVERSE TO APPELLANT, COULD NEVER RIPEN INTO TITLE.

(D).—APPELLANT, HAVING USED, OCCUPIED AND CLAIMED THE WHOLE OF THE CARROLL-MURRY WHARFSITE, INCLUDING THE PREMISES IN DISPUTE, ON AND PRIOR TO MAY 17, 1884, AND NOT HAVING ABANDONED THE SAME, IS PROTECTED IN ITS POSSESSION BY THE ACT OF CONGRESS ON THAT DATE.

The trial Judge, in his Memorandum of Decision, decided (Rec. p. 27) that "In 1884 plaintiff had use, occupation and claim of the tide land in controversy,

but after 1894 it did not continue the use or occupation of the tide land in controversy." No finding of fact, however, was made by the court to that effect, but since this part of the decision is based upon the undisputed evidence, it is apparent that the fact that from the date the Carroll-Murry wharfsite was located, on March 6, 1881, until the year 1894, every portion of it was used, occupied and claimed by appellant's grantors, was proven to the satisfaction of the trial court.

The trial court further decided, in effect, that appellant abandoned the premises in dispute when it discontinued the use of the Carroll-Murry wharf, in the year 1894 (Rec. p. 25), though no finding was made to that effect. However, the first finding of fact was that on April 15, 1900, the premises in dispute were vacant, unused, unoccupied, unappropriated land of the United States (Rec. p. 30). This was, considering the decision of the court, tantamount to a finding of abandonment.

At the outset, therefore, we are confronted with the question of abandonment, upon which the case turned in the court below.

The only evidence of abandonment by appellant of the premises in dispute prior to April 15, 1900, the date of Mr. James' first entrance on the property, is that from 1894 to 1900 the land was not actually used or occupied; but it must be remembered that the 113 feet of tide lands in dispute was a portion of the original Carroll-Murry wharfsite and that from 1894 to the date of this suit the remaining portion of the wharfsite

was occupied, used and the whole thereof claimed during all of said period, as it had been since the year 1881.

The conveyances introduced in evidence (Rec. pp. 614 et seq.) show a perfect chain of title from Murry to the Pacific Coast Company. The whole wharfsite, including the 113 feet of tide lands now claimed by Mr. James, was conveyed, the last conveyance having been executed in 1898, two years after vessels had ceased landing at the wharf. On March 21, 1898, patent was issued to Waterbury and Coolidge (Rec. pp. 644-648), and in said patent the whole wharfsite, including the 113 feet of tide lands now claimed by Mr. James, was described by metes and bounds. The conveynace of the whole wharfsite to the Pacific Coast Company, from Waterbury and Coolidge, executed April 1, 1898 (Rec. pp. 659-670), contained the same description. That circumstance in itself clearly indicated that a bona fide claim of ownership was made by appellant at the time these conveyances were executed and certainly negatived any intention to abandon said property.

There is no evidence of any intention on the part of appellant or its grantors to abandon the premises in dispute, and the mere fact that every portion of the Carroll-Murry wharfsite was not used after the year 1894 is not, as we expect to show, an abandonment of the premises.

The facts as shown by the evidence are that from 1882 down to 1894 appellant and its grantors actually

used, occupied and claimed the whole wharfsite (Rec. p. 94) and from 1894 have exercised numerous acts of ownership over and have claimed the whole wharfsite, including the premises in dispute; have leased portions of the same to various corporations and individuals (Rec. pp. 282-283, 366); have leased the property in dispute to Mr. Davidson (Rec. p. 270); have given permission to at least one other person, Mr. Messerschmidt, to occupy the same (Rec. pp. 339, 351, 528); and have paid all the taxes upon the property in dispute (Rec. pp. 276, 342, 356, 357, 362).

There is no evidence of any intention on the part of the Pacific Coast Company to abandon the property in dispute. On the contrary, it has been the intention of the company to construct on said wharfsite a larger wharf when business justified the undertaking, and it is the present intention to construct a wharf with a 600 foot face in order to accommodate the increased traffic due to the revival of business in Alaska (Rec. pp. 120-122).

No statute exists in Alaska by virtue of which it can be asserted that the non-user of real property will result in the loss of title thereto.

Abandonment is largely a question of intention. If a person in possession of land leaves it with the intention of returning, he does not abandon it. A mere failure to occupy land for a long period does not necessarily constitute an abandonment. Until abandonment, a person may recover against a trespasser, unless his action is barred by the statute of limitations. When

prior possession is once shown, there is no presumption of its loss. Abandonment must be made to appear affirmatively by the party relying upon it to defeat a recovery, and slight circumstances are admissible to indicate an intention not to abandon.

*Moon vs. Rollins,* 36 Cal. 333;

*Phy vs. Hatfield,* 135 Am. State Rep. 888;

*Keane vs. Cannovan,* 21 Cal. 291;

*Sweeney vs. Riley,* 42 Cal. 402;

*St. John vs. Kidd,* 26 Cal. 263;

*Bell vs. Bedrock, Tunnel, etc. Co.,* 36 Cal. 214;

*Weill vs. Lucerne Mining Co.,* 11 Nev. 200;

*Watts vs. Spencer,* 94 Pac. 39;

*Hough vs. Porter,* 98 Pac. 1083, and 102 Pac. 728;

*Phillips vs. Hamilton,* 95 Pac. 846;

*Lindbloom vs. Rocks,* 146 Fed. 660;

*Booming Co. vs. Hubbell,* 97 N. W. 157;

*Whitman vs. Lifting, etc. Co.,* 116 N. W. 614;

*Bayne vs. Brown,* 118 Pac. 282;

*Lyons vs. Andry,* 87 Am. St. Rep. 299;

*Crary vs. Dye,* 208 U. S. 515;

*North American E. Co. vs. Adams,* 104 Fed. 404;

*White's Guardian vs. Martin,* 2 Alaska 496;

*Smith vs. Hope Mining Co.,* 45 Pac. 632;

*Thorndyke vs. Alaska Perseverance Mining Co.,* 164 Fed. 657.

The undisputed testimony shows that appellant has never had the intention of abandoning the premises in dispute, and, measured by the rules laid down in the cases above cited, has by no overt act indicated such an intention. Without an intention to abandon, there can be no abandonment. Appellant was therefore entitled to the fourth finding of fact requested of the trial court (Rec. p. 809). We submit that Finding No. 1 (Rec. p. 30) was not supported by any evidence in the case.

Appellant, not having abandoned the premises in dispute, is entitled to the protection afforded by the Act of Congress of May 17, 1884. The first proviso of the eighth section of this Act (C. 53, 23 Stats. L., 24, 26; Compiled Laws of Alaska, p. 144) is as follows:

"Provided, That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress:"

The proviso following the one just quoted is as follows:

"And provided further, That parties who have located mines or mineral privileges therein under the laws of the United States applicable to the public domain, or who have occupied and improved or exercised acts of ownership over such claims, shall not be disturbed therein, but shall be allowed to perfect their title to such claims by payment as aforesaid:"

Congress, by this last proviso, expressly enacted that owners of mining claims should not be disturbed

in their possession but should be allowed to perfect their title under laws which were then in effect and extended to Alaska. There was no law in effect and extended to Alaska relating to the public domain other than mineral lands. So Congress enacted by the first proviso of the eighth section of the above Act that occupants of other than mineral lands, any lands, in fact, should not be disturbed in their possession of such lands but the terms under which they might acquire title were reserved for future legislation. Congress must have intended that occupants of other than mineral lands should ultimately be permitted to acquire title. This intention is evidenced by the method of dealing in the succeeding proviso with the rights of occupants of mineral lands. That Congress had such an intention was the view taken by the court in the case of *Young vs. Goldstein*, 97 Fed. 303.

The first proviso of the eighth section of the Act of 1884 has been construed many times by the district court for the District of Alaska, and several times by Circuit Court of Appeals for the Ninth Circuit. In all these cases it is held that a person claiming land under and by virtue of the above section, deriving title from Indians, *or other persons*, who were in possession of such land, and who claimed the same prior to the passage of said Act, has a good title against every one subsequently claiming it, and against the United States, until Congress shall provide for the disposition of such lands by enacting a law permitting such persons to acquire title, as was contemplated in the Act of 1884.

*Heckman vs. Sutter*, 119 Fed. 83;

*Carroll vs. Price*, 81 Fed. 137;

*Young vs. Goldstein*, 97 Fed. 303;

*Heckman vs. Sutter*, 128 Fed. 393;

*McCloskey vs. Pacific Coast Co.*, 160 Fed. 794;

*Miller vs. Blackett*, 47 Fed. 547;

*Haltern vs. Emmons*, 46 Fed. 452.

In *Carroll vs. Price*, 81 Fed. 137, Judge Delaney, in instructing the jury, construing the above section of the Act of 1884 (at page 139), says:

"When Congress enacted this law it undoubtedly had in view the condition of affairs in this country, and, in order to protect settlers upon the public lands here, incorporated into said act the proviso above mentioned, which is in the following language:

* * * Under this provision, all persons who are in the actual use and occupancy of tracts of public land in this district, or who had laid claim to such tracts or pieces of land at the time this law was enacted, are protected against intrusion, and their possession cannot be disturbed. This provision is a mandate to the general land office to the effect that it cannot grant title adversely to a citizen who is in actual possession or occupancy, *or who has a bona fide claim to** a piece or tract of public land in this district; and the court also construes this provision as a mandate to the court that it shall not disturb a citizen who is in actual possession, or who has a well-founded bona fide claim to lands in Alaska."

And on page 140:

"These are things which you have a right to consider, on both sides of the case, for the purpose of de-

*The italics are ours.

termining this question of occupancy and possession, and a bona fide intention on the part of the claimant to hold the land. The possessory right in and to government lands, when once acquired, may be conveyed from one person to another, and instruments in writing making such conveyances are admissible in evidence, and may be considered by you as tending to establish possession."

And on page 142:

"The court therefore charges you that the United States holds paramount title to tide lands in this territory, and, where the right of navigation is not impaired, rights of possession by citizens of the United States to such tide lands will be determined by the same rules of law as govern similar rights on the uplands; and this court will apply to the tide lands the rules that American citizens may occupy, possess, use and improve the same, subject, howevr, to the paramount right of free navigation; and that the prior possession will determine the prior right, until 'future legislation by Congress,' as to uplands, or until the ultimate sovereign, whether state or federal, having title to tide lands, shall otherwise provide in relation thereto."

It is significant that the Court of Appeals has given full force and effect to the entire language of the proviso of the Act above quoted; holding that a person who was in the actual possession or occupancy, or who claimed the possession and right of possession of tide lands prior to May 17, 1884, could not be disturbed.

In *Young vs. Goldstein*, 97 Fed. 303, the court, on page 308, in part, held:

"In our opinion, the language used is susceptible of but one construction; i. e. that Congress guaranteed to all persons in possession of lands in Alaska at that date the right ultimately to acquire a perfect title to

the same. If anything less was intended, then the act is wholly meaningless. If Congress meant only to guaranty to them undisturbed possession for the time being, reserving the right to ultimately pass such laws as would confiscate the property to the government, or give it to another, then the act is worse than a mockery. If the expression 'the terms under which such persons may acquire title,' means anything, it means that at some future date the Congress will pass the needful legislation whereby their possession will ripen into perfect ownership. And until such legislation is enacted the 'future legislation' is yet to be achieved."

In *Heckman vs. Sutter,* 119 Fed. 83, which involved the title to certain tide lands in Alaska, the court, again construing the Act of 1884, in part said (page 88):

"When, in 1884, Congress undertook to provide a civil government for Alaska, it made of the territory a land district, located a United States land office at Sitka; put in full force and effect therein 'the laws of the United States relating to mineral claims and the rights incident thereto,' with certain conditions not necessary to be mentioned, withholding therefrom the application of 'the general land laws of the United States,' and expressly declaring 'that the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress.' Section 8, Act May 17, 1884 (23 Stat. 24). There has been no 'future legislation by Congress' that applies to the present case, for this case involves no question of purchase or entry, and concerns only the right of occupancy and use of certain of the lands of the United States, including a small strip of tide land, as against a similarly asserted right on the part of third persons, which occupancy and use in no manner interferes with

the right of navigation of the public waters. The prohibition contained in the act of 1884 against the disturbance of the use or possession of any Indian or other person of any land in Alaska claimed by them is sufficiently general and comprehensive to include tide lands as well as lands above high-water mark. Nor is it surprising that Congress, in first dealing with the then sparsely settled country, was disposed to protect its few inhabitants in the possession of lands, of whatever character, by means of which they eked out their hard and precarious existence. The fact that at that time the Indians and other occupants of the country largely made their living by fishing was no doubt well known to the legislative branch of the government, as well as the fact that that business, if conducted on any substantial scale, necessitated the use of parts of the tide flats in the putting out and hauling in of the necessary seines. Congress saw proper to protect by its act of 1884 the possession and use by these Indians and other persons of any and all lands in Alaska against intrusions by third persons, and so far has never deemed it wise to otherwise provide. That legislation was sufficient authority, in our opinion, for the decree of the court below securing the complainants in the use and possession of land which the evidence shows and the court found was held and maintained at the time of their disturbance therein by the defendants, and for years theretofore had been so held and maintained. The judgment is affirmed."

In a subsequent hearing between the same parties, reported in 128 Federal, 393, the court, commenting on the former decisions, on page 394, said:

"Further consideration has but confirmed us in the correctness of these views. The act of 1884 made no provision for the disposition of the title of any of the public domain except mineral lands; on the contrary, it thereby expressly withheld from Alaska the application of 'the general land laws of the United

States.' Section 8, Act May 17, 1884, C. 53, 23 Stat. 24, 26. Those general land laws are not, therefore, the source from which to derive the meaning of Congress in using the words 'any lands' in the proviso of the act of May 17, 1884, 'that the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation *or now claimed by them**.' Having extended to Alaska the laws of the United States relating to mineral claims only, if Congress had intended to protect the Indians and other persons in their possession of or claim to such mineral claims only, one would naturally expect the intention to be manifested by the words 'such mineral claims,' or 'such mineral lands,' or other equivalent limited expression, and not by the broad and comprehensive words 'any lands,' used in the act of 1884. Nor is it reasonable to suppose that Congress intended the broad and comprehensive terms thus used by it to be limited by the interpretation put upon the term 'public lands' in the general land laws, which it expressly provided should not be in force in Alaska. In providing for a civil government for that territory, as it did by the act of 1884, Congress was dealing with the then condition of the country; and in providing for such a government it saw proper to protect the existing possession of any and all lands then held by the Indians or other persons in the territory. These, as Congress must have known, were at the time but few in number. It did not provide for the protection of the possession of any lands by any person or persons who might acquire possession or make claim thereto in the future. It is true that it has never been the policy of the United States to dispose of its tide lands, but, on the contrary, that its policy has always been to retain them for the benefit of the future state in which they might lie. But it is thoroughly settled that the United States has all the power of national and municipal government over its territories, and may, if it sees fit to do so, grant rights

*The italics are ours.

in or titles to the tide lands of its territories as well as the public lands therein situated above high-water mark. *Shively vs. Bowlby,* 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331, and the numerous cases there cited."

In the case of *McCloskey vs. Pacific Coast Co.,* 160 Fed. 794, on page 801, the court said concerning the Murry wharfsite:

"But notwithstanding that the theory upon which the court below awarded its injunction may have been erroneous, the injunction must not be disturbed if in the pleadings and the proofs we may discover any tenable ground upon which it may be sustained. We find such ground in the fact which is shown by the bill and in the proofs that the appellee's grantors at the date when the act of Congress of May 17, 1884, C. 53, 23 Stat. 24, was enacted, *claimed the possession and the right of possession** of all the tide lands in front of their property, and have ever since maintained such claim excpet so far as they have conceded the public use of the street and sidewalk. That act of Congress provided a civil government for Alaska, and, among other things, enacted 'that the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation *or now claimed by them**, but the terms under which said persons may acquire title to said land is reserved for future legislation by Congress.' There has been no subsequent legislation affecting the right of possession thus recognized, and the protection thus afforded by the statute has not as yet been withdrawn. The appellee having this right of possession of the tide land between the roadway and the line of low tide could protect such possession by any appropriate suit or action."

Measured by these authorities, appellant, by virtue of the protection afforded by the Act of 1884, *supra,*

*The italics are ours.

is the owner of the tide lands themselves, at least until Congress provides for their disposition, and is not merely the owner of an easement over and across the same. The ownership of the tide lands comprehends the right to possess and enjoy the same and each and every part thereof.

Appellant being, as the testimony conclusively shows, in actual physical possession of the major portion of said wharfsite and claiming the whole of the same, including the ground in dispute at the time this suit was instituted, is entitled to be protected in its possession and right to the possession of the whole of said premises, including the portion in dispute.

(B).—APPELLANT, HAVING BEEN IN ACTUAL POSSESSION OF THE GREATER PORTION OF THE CARROLL-MURRY WHARFSITE AND CLAIMING THE WHOLE THEREOF UNDER COLOR AND CLAIM OF TITLE, MUST BE CONSIDERED TO HAVE BEEN, AT THE DATE APPELLANT ENTERED UPON THE PREMISES IN DISPUTE, IN ACTUAL POSSESSION OF THE SAME.

The undisputed testimony shows that prior to May 17, 1884, appellant's grantors were in the actual possession of the whole of the wharfsite, claiming the same adversely to all the world under a bona fide *claim of title*, to-wit: The Murry location notice of March 6, 1881; further, that on the 26th of March, 1881, this claim of title to the wharfsite was unanimously recog-

nized and endorsed by the miners and citizens of Rockwell (now Juneau) by the following resolution:

"Whereas, Captain M. W. Murry has located outside and to the east of the city a wharfsite and proposes at earliest opportunity to build a wharf and warehouse for the accommodation of vessels and steamers and for the benefit of all citizens alike, it is the sense of the meeting that we should encourage such an enterprise; therefore it is hereby "Resolved that the miners and citizens of the District and City, recognizing that such improvements would be a public benefit, hereby accept, endorse and recognize the rights of said Capt. Murry and will by our future acts endorse and recognize his rights to the said wharfsite and improvement." (Rec. p. 612).

It is our contention that on May 17, 1884, this claim of title became *color of title* by the operation of the first proviso to the eighth section of the Act of 1884 (C. 53, 23 Stats. 24, 26), passed by Congress on said date. It is apparent from the language of the Act itself that this proviso gave such color of title.

The undisputed testimony further shows that on that date and for many years subsequent thereto the claim of the grantors of the appellant to the whole of the wharfsite was universally recognized by the miners and citizens of this community; also that the tract of tide lands 600 feet wide was reasonably limited as to size, and was in good faith occupied and claimed on and prior to May 17, 1884. This was the decision of the court (Rec. p. 24), based upon the uncontradicted testimony, though no finding of fact to that effect was made.

The trial court decided that appellant had no color of title, because, in his opinion, the Murry location notice was not color of title; but the learned judge failed to consider the other conveyances also relied upon by appellant to give color of title. Appellant does not rely solely upon the Murry location notice coupled with the first proviso of the eighth section of the Act of 1884 to give it color of title to the wharfsite. The quitclaim deeds to appellant and its grantors conveying the wharfsite, including the porition in dispute (Rec. pp. 614 et seq.) were each, we claim, color of title. One of these quitclaim deeds (Rec. p. 619) was a mesne conveyance acknowledged February 18, 1884, some three months prior to the passage of the Act of May 17, 1884. This deed we claim is also color of title.

That a quitclaim deed is color of title is elemental.

*Archer vs. Bichl*, 136 Fed. 113;

*Tyee Consolidated Mining Co. vs. Langstedt*, 136 Fed. 134.

As previously stated, the testimony is uncontradicted, and the court decided, that appellant and its grantors used, occupied and claimed the whole wharfsite during the period from 1881 to 1894. Such use, occupation and claim were maintained under valid quitclaim deeds, which were color of title. From 1894 appellant was in possession of the major portion of the wharfsite, claiming the whole thereof by virtue of other quitclaim deeds, which were also color of title. Being in actual possession of the major portion of the wharf-

site under color and claim of title, appellant must be considered to have been in constructive possession of the premises in dispute. This was the situation when Mr. James first entered the property, and it continued until this suit was instituted. We submit it was unnecessary for appellant to maintain actual foot possession of the premises in dispute, under these circumstances.

*Green vs. Liter,* 8 Cranch, 229; 3 L. Ed. 545;

*Clarke vs. Courtney,* 5 Peters, 819; 8 L. Ed. 140;

*Miller's Heirs and Devisees vs. M'Intyre,* 6 Peters, 731; 8 L. Ed. 320;

*Ellicott vs. Pearl,* 10 Peters, 412; 9 L. Ed. 475;

*Hunnicut vs. Peyton,* 102 U. S. 333; 26 L. Ed. 113;

*Deputron vs. Young,* 134 U. S. 241; 33 L. Ed. 923;

*Archer vs. Bichl,* 136 Fed. 113;

*Tyee Consolidated Mining Co. vs. Langstedt,* 136 Fed. 134.

(C).—THE POSSESSION OF APPELLANT, NOT HAVING BEEN CONTINUOUS AND ADVERSE TO APPELLANT, COULD NEVER RIPEN INTO TITLE.

In order to prevail in this action, appellee must prove that his possession was adverse to appellant. We fail to recollect any evidence of the adversity of his possession, nor was adverse possession pleaded by appellee. In fact, both in the pleadings and in the proof on behalf of appellee, his possession was referred to as

being open, notorious use and occupation. The term *adverse* was conspicuous by its absence. Nor was there any intimation that the acts of Mr. James in using the property were in any sense adverse to appellant. Likewise his use and occupation prior to 1905 was neither exclusive, continuous or hostile—all necessary elements of adverse possession—and in 1905 a break and interruption of his use and occupation occurred through the erection and occupation of a landing platform 60 or 70 feet square (Rec. pp. 582, 583), on the premises in dispute, by Mr. Davidson, under lease from appellant in the year 1905 (Rec. p. 579). This platform and the whole of the premises in dispute were exclusively occupied by appellant's tenant without let or hindrance from appellee (Rec. pp. 468-472).

The statute of limitations without color of title is 10 years in Alaska (Compiled Laws of Alaska, Section 836). That bar has not tolled, and as Mr. James has admitted having no color of title (Rec. p. 481), he is therefore unable to take advantage of the seven-year statute of limitations under color and claim of title (Compiled Laws of Alaska, Section 1874).

There is a virtual agreement by all the authorities that in order to bar the true owner of land from recovering from an occupant in adverse possession and claiming ownership through the operation of the statute of limitations, the adverse possession must have been for the whole period prescribed by the statute, actual, open, visible and notorious, continuous without a break and

hostile or adverse to the true owner's title and the world at large.

*Doswell vs. De La Lanzo,* 20 How. 29; 15 L. Ed. 824;

*Armstrong vs. Morrill,* 14 Wall. 120; 20 L. Ed. 765;

*Ward vs. Cochran,* 150 U. S. 597; 37 L. Ed. 1195;

*Sharon vs. Tucker,* 144 U. S. 533; 36 L. Ed. 532;

*Shuffleton vs. Nelson,* 2 Saw. 540; Fed. Cas. No. 12822;

*Eastern Oregon Land Co. vs. Cole,* 92 Fed. 949.

If any of these characteristics is wanting, the bar of the statute is not complete.

*Eastern Oregon Land Co. vs. Cole,* 92 Fed. 949.

It is conceded that Mr. James has no color of title (Rec. p. 481) and that title to the tide lands in question is in the United States. Until patent has been issued, the statute of limitations without color of title, which is 10 years in Alaska (Compiled Laws of Alaska, Section 836), does not commence to run. The possession of the appellee, therefore, being without color of title, no matter how long it continued, was not such as would ever ripen into a title which could be asserted against the United States or made the basis of a title against subsequent grantees, for the rule is well settled that rights cannot be acquired in public lands by the statute of limitations.

*Gibson vs. Chouteau,* 13 Wall. 92; 20 L. Ed. 534;

*Redfield vs. Parks,* 132 U. S. 239; 33 L. Ed. 327;

*Slaight vs. N. P. Ry. Co.,* 205 U. S. 122; 51 L. Ed. 738; 39 Washington State Reports 576;

*McIlhinney vs. Ficke,* 61 Mo. 329;

*James vs. Wilkinson,* 42 Pac. 735;

*Tyee Consolidated Mining Co. vs. Langstedt,* 136 Fed. 124.

The reasoning upon which these decisions are based is absolutely sound, for there can be no interference with the primary and absolute right of disposition of the soil by the government. If the rule were otherwise, squatters could gobble up the entire domain belonging to the state or government and hold it as against the state's or government's grantee, and thus deprive the state or the government of its absolute and primary right of disposing of its land.

Under such a state of facts we contend that appellee has been at all times mentioned in his answer and is now a tenant at will or by sufferance of the appellant, or a naked trespasser, entitled to occupy the premises in dispute so long as it suits the convenience of the appellant but not longer.

In the case of *Jasperson vs. Scharnikow,* 150 Fed. 571, 15 L. R. A. (N. S.), at page 1182, Judge Gilbert, quoting the language of the trial court, well said:

"This idea of acquiring title by larceny does not go in this country. A man must have a bona fide claim or believe in his own mind that he has got a right as

owner when he goes upon land that does not belong to him, in order to acquire title by occupation and possession. The defendant's evidence fails to show any claim of right in Bryant when he went on the land. There is not a particle of testimony that squints in the direction that he supposed that he had any right, or that he went there for any other purpose than to acquire right, if he could do so by holding long enough without molestation."

In the case at bar there was no testimony submitted on behalf of the defendant tending to show that Mr. James had a bona fide claim to the property at the time he entered thereon, or that he had or supposed he had any right or that he went there for any other purpose than to acquire a right, provided he could do so by holding long enough without molestation. The rule of law pronounced by this court in the Jasperson case should therefore be applicable here.

To recapitulate, we rely upon (1) a valid location of a wharfsite recognized by everyone and protected by the provisions of the Act of 1884; (2) a total absence of any evidence indicating an intentional abandonment of the claim; and (3) a total lack of adverse possession on the part of appellee as defined by our statute and the authorities.

There has been no legislation subsequent to the Act of 1884 removing the protection of that law from appellant. Appellee has failed in his obligation of proving that appellant has abandoned the property in dispute and has likewise failed to establish his adverse possession.

There can be no question about the location of the entire wharfsite, which includes the portion involved in this controversy, and a bona fide intention on the part of appellant to hold the land. There is an utter absence of any evidence which would justify a finding to the effect that appellant or its predecessors in interest deliberately or intentionally, or at all, abandoned the land in controversy. There is not the slightest trace of color of title to the claim of the appellee. We submit that it will be impossible to distinguish the facts in this case from those referred to in the case of *McCloskey vs. Pacific Coast Company,* 160 Fed. 794, as recited by this court, to-wit (p. 801):

"We find such ground in the fact, which is shown by the bill and in the proofs, that the appellee's grantors at the date when the Act of Congress of May 17, 1884, C. 53, 23 Stat. 24, was enacted, claimed the possession and the right of possession of all the tide lands in front of their property, * * *"

We contend that the finding of this court should be that appellant has acquired a title to the ground in dispute which will not be disturbed, for to do so would give judicial sanction to a mode of acquiring title to property which is directly in conflict with its decisions. Under the facts in this case, this property cannot be taken from appellant either by judicial decision or by legislation, for Congress has pledged itself to subsequently provide a method for disposing of the property to those who claimed it on the 17th of May, 1884.

Resting upon these grounds and invoking the doctrine of judicial precedent, we urge that the judgment

of the District Court be reversed and that appellant be granted the relief prayed for in its bill.

Respectfully submitted,

SHACKLEFORD & BAYLESS,

Attorneys for Appellant.

FARRELL, KANE & STRATTON,

Of Counsel, Seattle, Wash.